STEVE D. MAYBERRY
MEHRLE JENNINGS
MARK JENNINGS

IBLA 83-636, 83-839 Decided September 12, 1984

Appeal from decisions of the California State Office, Bureau of Land Management, rejecting prospecting permit/mineral lease applications CA 11849 and CA 11850.

Affirmed.

1. Mineral Lands: Leases -- Mineral Lands: Prospecting Permits -- National Park Service Areas: Generally

   Bureau of Land Management properly rejects combination prospecting permit/mineral lease applications for lands within the Whiskeytown Unit of the Whiskeytown-Shasta-Trinity National Recreation Area that are not open to mineral leasing under 43 CFR 3566.2-2.

2. Regulations: Generally

   The Board of Land Appeals has no authority to declare invalid 43 CFR Subpart 3566, a duly promulgated regulation of this Department.

3. Mineral Lands: Leases -- Mineral Lands: Prospecting Permits

   An application to acquire mineral rights in public lands does not create a property right in the applicant.

APPEARANCES: Steve D. Mayberry, Mehrle Jennings, Mark Jennings, pro sese; Lynn M. Cox, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Steve D. Mayberry, Mehrle Jennings, and Mark Jennings have appealed from decisions of the California State Office, Bureau of Land Management (BLM),

dated April 13 and May 26, 1983, which rejected their applications for hard-rock (gold) prospecting permits CA 11849 and CA 11850. 1/ The applications were rejected because the applied-for lands were within the Whiskeytown Unit of the Whiskeytown-Shasta-Trinity National Recreation Area under the jurisdiction of the National Park Service (NPS) and closed to mineral leasing. 2/ The decisions appealed from recite:

> The lands applied for in the application lie within the Whiskeytown Unit of the Whiskeytown-Shasta-Trinity National Recreation Area. The subject lands are under the jurisdiction of the National Park Service, and mineral leasing therein is governed by the regulations of 43 CFR 3566.2-1(b) and 43 CFR 3566.2-2(b). The latter regulation cited closed the following lands within the Whiskeytown Unit to all mineral leasing including the issuance of prospecting permits: (1) All waters of Whiskeytown Lake and all lands within one mile of that lake measured from the shoreline at maximum surface elevation; (2) All lands classified as high density recreation, general outdoor recreation, outstanding natural, and historic, as shown on the map entitled "Land Classification, Whiskeytown Unit, Whiskeytown-Shasta-Trinity National Recreation Area"; and (3) All lands within Sec. 34, T. 33 N., R. 7 W., MD Mer.

Because the lands applied for were within areas closed to leasing and the NPS had recommended to BLM that the applications be rejected, 3/ BLM rejected the applications in their entirety under the provisions of 43 CFR 3566.3.

1/ These applications were originally filed for gold leases under the provisions of 43 CFR 3568 in effect prior to Jan. 20, 1982. Regulations which provided for mineral leases were superseded by changes effective that date which currently govern prospecting permits in the Whiskeytown-Shasta-Trinity National Recreation Area under 43 CFR 3566.

2/ CA 11849 was originally filed Sept. 8, 1981, and subsequently amended to include the following described lands:

T. 31 N., R. 6 W., MD Mer.,
Sec. 3, lots 2, 3, 6, and 7 (W 1/2 E 1/2), and
lots 9 and 12 (NE 1/4 NW 1/4);
Sec. 10, lots 18 and 23 (W 1/2 NE 1/4).
T. 32 N., R. 6 W., MD Mer.,
Sec. 33, N 1/2 NE 1/4;
Sec. 34, NW 1/4 SW 1/4, and S 1/2 SW 1/4.

CA 11850 was originally filed Sept. 8, 1981, and subsequently amended for the following described lands:

T. 33 N., R. 7 W., MD Mer.,
Sec. 34, E 1/2 NE 1/4, NW 1/4 NE 1/4, NE 1/4 SE 1/4,
NW 1/4 SE 1/4, SE 1/4 SE 1/4;
Sec. 35, SW 1/4 SW 1/4

3/ In response to BLM requests, the superintendent of the Whiskeytown-Shasta-Trinity Recreation Area, NPS, reported by letters dated Mar. 23, and Apr. 28, 1983, that the lands within both permit applications were within the excepted areas closed to mineral leasing and recommended the applications be rejected.

Appellants contend in their statement of reasons, generally, that BLM's denial of their applications is not consistent with congressional intent expressed by the statute creating the Whiskeytown-Shasta-Trinity Recreation Area. They also argue that required mineral management planning and coordination between executive agencies charged with responsibility for the recreation area has not been accomplished, and that rejection of their applications is without legal foundation. Further, appellants contend, preparation of an environmental impact statement is required prior to a determination that mining is not allowed in parts of the recreation area. Appellants take the position that, in any event, NPS exceeded its authority by regulating mineral use of the area. They claim that BLM should take independent final action upon any review of mining activity within the recreation area.

[1] The Whiskeytown-Shasta-Trinity Recreation Area was established by Act of November 8, 1965, 43 U.S.C. §§ 460q through 460q-9 (1982). Section 6 of the Act, 43 U.S.C. § 460q-5 (1982), withdrew the lands in the recreation area from location, entry, and patent under the mining laws, but authorized the Secretary of the Interior to permit the leasing of both leasable and nonleasable minerals within the recreation area if "such disposition would not have significant adverse effects on the purposes of the Central Valley project or the administration of the recreation area." In December 1981 NPS, in coordination with BLM, revised the Department's regulations governing mineral leasing in units of the national park system where such activity is authorized by the statutes establishing the units. See generally 46 FR 62038-44 (Dec. 21, 1981). This revision identified specified areas within certain recreation areas to have higher values than for mineral leasing. Those areas were closed to mineral leasing. These specific areas were described at 43 CFR 3566.2-2, which provides in pertinent part:

> The following areas shall not be open to mineral leasing.
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> * * * * * * *
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> (b) Whiskeytown Unit of the Whiskeytown-Shasta-Trinity National Recreation Area. (1) All waters of Whiskeytown Lake and all lands within one mile of that lake measured from the shoreline at maximum surface elevation.
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> (2) All lands classified as high density recreation, general outdoor recreation, outstanding natural, and historic, as shown on the map numbered 611-20, 004B, dated April 1976, entitled "Land Classification, Whiskeytown Unit, Whiskeytown-Shasta-Trinity National Recreation Area." This map is available for public inspection in the Office of the Superintendent.
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> (3) All lands within Section 34 of Township 33 north, Range 7 west, Mt. Diablo Meridian.

The excepted areas are those areas in which NPS determined that mineral entry activity would be incompatible with the primary recreational purposes for which the recreation unit was established. 46 FR 62041-42 (Dec. 21, 1981). Where it is clear from the record that lands sought for mineral development are within these excepted areas, they are not available for mineral leasing or prospecting, and such applications must be rejected. David Britton, 74 IBLA 271 (1983). It is clear in these cases that the applied for lands fall within the excepted areas and that this Board's

findings in Britton, supra, are dispositive of these appeals. In Britton, an appeal involving applications nearly identical to those made in this case, the Board found that NPS had properly exercised the authority of the Secretary conferred by regulation.

Moreover, NPS examined the areas applied for by appellants and recommended against favorable consideration. In this regard, appellants argue that BLM should not be bound by the NPS determinations, and should examine the matter on its own, and that BLM should be the sole arbiter of mineral leasing within this area.

This Board rejected the same assertion in Britton, supra at 274, stating:

> NPS does have the authority to withhold consent to leasing the areas of the Whiskeytown Unit at issue. The Secretary of the Interior may lease minerals in the Whiskeytown Unit if it will not have a significant adverse effect on the administration of the recreation area. 16 U.S.C. § 460q-5 (1976). In exercising the Secretary's discretion to lease, NPS, as administrator of the unit, determined that leasing would be incompatible with the purposes of the unit in some areas where special values were identified in the master plan for the unit. Regulation 43 CFR 3566.2-2(b) represents a preemptory exercise of judgment and notice to the public that the lands are not available for leasing. This is not a case where leasing is generally permitted but NPS has declined to give its consent under 43 CFR 3566.3 in a particular instance. See DeAnn T. Gaeth, 69 IBLA 79 (1982). BLM is bound by duly promulgated regulations of the Secretary, in this case the regulation stating that the areas involved are not available for leasing. Wilfred Plomis, 34 IBLA 222 (1978). [Footnote omitted.]

See also in this connection, Edward Seggerson, Jr. (On Reconsideration), 74 IBLA 267 (1983). Appellants challenge the propriety of NPS promulgation of the regulations. There is nothing of record to indicate that the required procedures for notice and publication of proposed regulations were not followed. The public was advised of the proposed action and invited to participate with comments and suggestions. Moreover, the excepted areas were based upon published management plans which were developed following public participation. NPS provided the justification for the closure of the designated areas to leasing in the preamble to the proposed regulation, as follows:

> Excepted Areas
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> National recreation areas contain special nationally significant values and were established to provide for public outdoor recreation and to preserve scenic, scientific and historic features. To protect these special values, certain portions of the recreation areas are recommended for exception from mineral leasing in the proposed regulations. The excepted areas were selected by reference to published management plans for the units involved. The only areas specifically closed to leasing in the regulations are those where leasing would categorically interfere with management goals or higher resource values. No leasing, prospecting,

> or exploration would be permitted on excepted areas. The regulations would thus provide written notice to prospective lessees of those areas where mineral leasing would not be considered.
> * * * * * * *
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> At Whiskeytown, special values identified in the Master Plan (1976) include the high density recreation, general outdoor recreation, outstanding natural features, natural environment, and historic zones. These zones, along with the lake and a setback from the shoreline, would be excepted from mineral leasing. This would result in excluding from mineral leasing, 18,000 acres where mineral extraction would conflict with park purposes, thereby facilitating the management of recreational opportunities and protecting outstanding natural and historic features and the water quality of the lake.
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> 45 FR 84392 (Dec. 22, 1980).

[2] It is well established that the Board of Land Appeals has no authority to declare invalid a duly promulgated regulation of this Department. Sam P. Jones, 71 IBLA 42 (1983); Enserch Exploration, Inc., 70 IBLA 25 (1983); Altex Oil Corp., 61 IBLA 270 (1982); Wilfred Plomis, supra. Appellants have shown no basis upon which to question the application of the closure of the excepted areas to mineral leasing required by duly promulgated regulation.

[3] Finally, appellants contend that BLM delays in handling their applications materially injured them, since those delays resulted in adjudication of their claims under the more restrictive regulations at 43 CFR Subpart 3566 which became effective on January 20, 1982. Appellants contend their previously filed applications conferred prior "existing rights" which cannot be divested by subsequent regulation. This contention is not correct. The filing of an application with the Department does not confer a right, but establishes at best an expectation that a right may be acquired in the future. An application to acquire mineral rights is not a right to the minerals applied for. See generally McTiernan v. Franklin, 508 F.2d 885, 888 (10th Cir. 1975). Appellants' other arguments based upon provisions of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-1784 (1982), the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1982), and provisions of the Departmental Manual, and authorities cited in support thereof are not material to this appeal and are rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

R. W. Mullen
Administrative Judge